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3
4 UNITED STATES DISTRICT COURT
5 EASTERN DISTRICT OF WASHINGTON

6 GEORGE R. JEWETT,)
7 Plaintiff,) No. CV-11-0017-JPH
8 v.) ORDER GRANTING DEFENDANT'S
9 MICHAEL J. ASTRUE, Commissioner) MOTION FOR SUMMARY JUDGMENT
10 of Social Security,)
11 Defendant.)
12)

13 **BEFORE THE COURT** are cross-motions for summary judgment,
14 noted for hearing without oral argument on June 15, 2012, ECF Nos.
15 18, 20. Attorney R. Gary Ponti represents Plaintiff; Special
16 Assistant United States Attorney Kathy Reif represents the
17 Commissioner of Social Security (Defendant). The parties have
18 consented to proceed before a magistrate judge, ECF No. 9. After
19 reviewing the administrative record and the briefs filed by the
20 parties, the court **GRANTS** Defendant's motion for summary judgment,
21 **ECF No. 20.**

22 **JURISDICTION**

23 Plaintiff applied for disability insurance benefits and
24 supplemental security income (SSI) under Sections 216(i), 223(b)
25 and 1614(a)(3)(A) of the Social Security Act on November 14, 2006
26 and November 15, 2006 respectively. He alleged disability as of
27 January 1, 2003 (Tr. 143-153). The application was denied
28

1 initially on December 14, 2006 and on reconsideration, September
2 13, 2007 (Tr. 76-79, 74-75).

3 At a hearing before Administrative Law Judge (ALJ) Michael S.
4 Hertzog on October 19, 2009, Plaintiff, represented by counsel,
5 and a vocational expert testified (Tr. 29-71). On January 22,
6 2010, the ALJ issued an unfavorable decision (Tr. 16-23). The
7 Appeals Council denied review on November 24, 2010 (Tr. 1-3),
8 making the ALJ's decision the final decision of the Commissioner.
9 Plaintiff filed this action for judicial review pursuant to 42
10 U.S.C. § 405(g) on January 13, 2011 (ECF No. 4).

11 **STATEMENT OF FACTS**

12 The facts have been presented in the administrative hearing
13 transcript, the ALJ's decision, and the briefs of the parties.
14 This court will adopt those facts and provide a brief summary.

15 Plaintiff was 44 years old at the hearing. He went to school
16 through the eighth grade but did not earn a GED. He has worked as
17 a logger, construction worker, irrigator of circular sprinkling
18 systems, and cannery laborer (Tr. 35-36, 37). He last worked in
19 June or July 2006 but stopped due to heart problems and chest
20 pains (Tr. 36). Plaintiff testified he has gotten two stents
21 since he filed for Social Security benefits (Tr. 37). He lives
22 alone in a camper trailer and is able to drive, cook, clean and do
23 his own laundry (Tr. 48). He states that he is 5'8" tall and
24 weighs 300 pounds, which has been his weight for several years
25 (Tr. 56). When he worked, he weighed from 180-220 pounds (Tr.
26 56). He states he is trying to be on a diet but doesn't know if
27 he has lost any weight due to the limitations of his scale, which
28 only measures up to 250 pounds (Tr. 37, 55, 56). He states that

1 he hunts deer and elk but explained that he sits in his brother-
2 in-law's field and shoots elk (Tr. 51-53). Although he is trying
3 to walk at least five minutes a day per doctor's orders, he states
4 he gets tired easily, has trouble breathing, and has chest pains
5 when he exerts himself (Tr. 49, 53, 54). He states he has to take
6 a nitro pill for chest pains, which he experiences about once a
7 week (Tr. 50, 51, 58, 60). He stated his goal is to lose weight
8 and get his cholesterol down (Tr. 55). He testified he still
9 smokes cigarettes on a daily basis, when he stops to see his wife
10 living at another location, but has been taking Chantix to help
11 him stop this "hard addiction" (Tr. 38, 39, 40, 45, 47). He takes
12 about 80 milligrams of Lasix per day (Tr. 54).

13 SEQUENTIAL EVALUATION PROCESS

14 The Social Security Act (the Act) defines disability as the
15 "inability to engage in any substantial gainful activity by reason
16 of any medically determinable physical or mental impairment which
17 can be expected to result in death or which has lasted or can be
18 expected to last for a continuous period of not less than twelve
19 months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also
20 provides that a Plaintiff shall be determined to be under a
21 disability only if any impairments are of such severity that a
22 Plaintiff is not only unable to do previous work but cannot,
23 considering Plaintiff's age, education and work experiences,
24 engage in any other substantial gainful work which exists in the
25 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).
26 Thus, the definition of disability consists of both medical and
27 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
28 (9th Cir.2001).

1 The Commissioner has established a five-step sequential
2 evaluation process for determining whether a person is disabled.
3 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person
4 is engaged in substantial gainful activities. If so, benefits are
5 denied. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(I). If not,
6 the decision maker proceeds to step two, which determines whether
7 Plaintiff has a medically severe impairment or combination of
8 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

9 If Plaintiff does not have a severe impairment or combination
10 of impairments, the disability claim is denied. If the impairment
11 is severe, the evaluation proceeds to the third step, which
12 compares Plaintiff's impairment with a number of listed
13 impairments acknowledged by the Commissioner to be so severe as to
14 preclude substantial gainful activity. 20 C.F.R. §§
15 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P,
16 App. 1. If the impairment meets or equals one of the listed
17 impairments, Plaintiff is conclusively presumed to be disabled.
18 If the impairment is not one conclusively presumed to be
19 disabling, the evaluation proceeds to the fourth step, which
20 determines whether the impairment prevents Plaintiff from
21 performing work which was performed in the past. If a Plaintiff is
22 able to perform previous work, that Plaintiff is deemed not
23 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At
24 this step, Plaintiff's residual functional capacity (RFC)
25 assessment is considered. If Plaintiff cannot perform this work,
26 the fifth and final step in the process determines whether
27 Plaintiff is able to perform other work in the national economy in
28 view of Plaintiff's residual functional capacity, age, education

1 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
2 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

3 The initial burden of proof rests upon Plaintiff to establish
4 a *prima facie* case of entitlement to disability benefits.

5 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir.1971); *Meanel v.*

6 *Apfel*, 172 F.3d 1111, 1113 (9th Cir.1999). The initial burden is

7 met once Plaintiff establishes that a physical or mental

8 impairment prevents the performance of previous work. *Hoffman v.*

9 *Heckler*, 785 F.3d 1423, 1425 (9th Cir.1986). The burden then

10 shifts, at step five, to the Commissioner to show that (1)

11 Plaintiff can perform other substantial gainful activity and (2) a

12 "significant number of jobs exist in the national economy" which

13 Plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th

14 Cir.1984); *Tackett v. Apfel*, 180 F.3d 1094, 1099 (9th Cir.1999).

15 **STANDARD OF REVIEW**

16 Congress has provided a limited scope of judicial review of a

17 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold

18 the Commissioner's decision, made through an ALJ, when the

19 determination is not based on legal error and is supported by

20 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995 (9th

21 Cir.1985); *Tackett*, 180 F.3d at 1097 (9th Cir.1999). "The

22 [Commissioner's] determination that a plaintiff is not disabled

23 will be upheld if the findings of fact are supported by

24 substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9th

25 Cir.1983)(*citing* 42 U.S.C. § 405(g)). Substantial evidence is more

26 than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119

27 n. 10 (9th Cir.1975), but less than a preponderance. *McAllister v.*

28 *Sullivan*, 888 F.2d 599, 601-602 (9th Cir.1989); *Desrosiers v.*

1 *Secretary of Health and Human Services*, 846 F.2d 573, 576 (9th
2 Cir.1988). Substantial evidence "means such evidence as a
3 reasonable mind might accept as adequate to support a conclusion."
4 *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (citations
5 omitted). "[S]uch inferences and conclusions as the [Commissioner]
6 may reasonably draw from the evidence" will also be upheld. *Mark*
7 *v. Celebrezze*, 348 F.2d 289, 293 (9th Cir.1965). On review, the
8 Court considers the record as a whole, not just the evidence
9 supporting the decision of the Commissioner. *Weetman v. Sullivan*,
10 877 F.2d 20, 22 (9th Cir.1989)(quoting *Kornock v. Harris*, 648 F.2d
11 525, 526 (9th Cir.1980)).

12 It is the role of the trier of fact, not this Court, to
13 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
14 evidence supports more than one rational interpretation, the Court
15 may not substitute its judgment for that of the Commissioner.
16 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
17 (9th Cir.1984). Nevertheless, a decision supported by substantial
18 evidence will still be set aside if the proper legal standards
19 were not applied in weighing the evidence and making the decision.
20 *Browner v. Secretary of Health and Human Services*, 839 F.2d 432,
21 433 (9th Cir.1987). Thus, if there is substantial evidence to
22 support the administrative findings and the decision is not based
23 on legal error, the finding of the Commissioner is conclusive.
24 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir.1987).

25 **ALJ'S FINDINGS**

26 At step one the ALJ found Plaintiff did not engage in
27 substantial gainful activity after onset (Tr. 18). At step two he
28 found Plaintiff suffers from coronary artery disease, a severe

1 impairment (Id.). At step three the ALJ found the impairment did
2 not meet or equal a Listed impairment (Tr. 19). The ALJ found
3 Plaintiff less than fully credible (Tr. 20). At step four, he
4 relied on a vocational expert and found Plaintiff was unable to
5 perform past relevant work (Tr. 21).

6 The ALJ found that the Plaintiff had an RFC to perform light
7 work as defined in 20 CFR 404.1567(b) and 416.967(b), finding that
8 he could occasionally climb, but should avoid concentrated
9 exposure to workplace heights, and needed to alternate sitting and
10 standing (Tr. 19). The ALJ also found he could lift no more than
11 20 pounds occasionally, but frequently lift up to 10 pounds. The
12 ALJ also noted that he could lift very little, but the job
13 category would include a good deal of walking or standing.

14 The ALJ concluded that based on the Plaintiff's age,
15 education, work experience, and residual functional capacity,
16 there are jobs that exist in significant numbers in the national
17 economy that Plaintiff can perform (Tr. 22).

18 ISSUES

19 Plaintiff alleges the ALJ erred by failing to take into
20 consideration Plaintiff's diagnosis of obesity as that diagnosis
21 would impact other medical diagnoses, as well as his residual
22 functional capacity assessment (ECF No. 18 at 2).

23 Plaintiff also alleges the ALJ erred by discounting his
24 testimony without having a physician examine him and fully
25 evaluate the nature and extent of his alleged limitations based on
26 fatigue and pain. *Id.*

27 The Commissioner disagrees, asserting the ALJ's decision is
28 supported by substantial evidence and free of legal error. The

1 Commissioner asks the Court to affirm the Agency's final decision
2 that Plaintiff was not disabled under the Social Security Act (ECF
3 No. 20 at 3).

4 DISCUSSION

5 A. Obesity and Plaintiff's RFC

6 Plaintiff alleges that the ALJ failed to consider the impact
7 of his obesity on his impairments, residual functional capacity,
8 and hence ability to work. (ECF No. 18 at 3-6). Plaintiff points
9 out that he underwent stress exercise tolerance tests and was
10 deemed to have moderate physical limitations due to fatigue (ECF
11 No. 18 at 5). Further, records filed on November 4, 2009, showed
12 that Plaintiff had severe sleep apnea as diagnosed by Dr. Kamaljit
13 K. Atwal, which was not addressed or commented on by the ALJ. *Id.*
14 Plaintiff states that on May 6, 2009 he had a Body Mass Index
15 ("BMI") of 44.7, but the ALJ "glossed over it without comment or
16 consideration." *Id.* Plaintiff concludes that the ALJ failed to
17 properly develop this case as it relates to the impact Plaintiff's
18 excess weight had on his capacity for physical activity. *Id.* at 7-
19 8.

20 The Commissioner, on the other hand, asserts that Plaintiff's
21 contention that the ALJ failed to evaluate his obesity when
22 defining Plaintiff's residual functional capacity is refuted by
23 the ALJ's decision. The ALJ did not err, the Commissioner argues,
24 by not finding Plaintiff's obesity severe at step two in the
25 evaluation process (ECF No. 20 at 5). The Commissioner states
26 that step two is a threshold determination according to *Hoopai v.*
27 *Astrue*, 499 F.3d 1071, 1076 (9th Cir. 2007). Once step two is
28 resolved in a claimant's favor, the importance of the records is

1 whether they establish any work-related limitations. *Id.* The
2 Commissioner concludes that Plaintiff has not raised an error
3 because any limitations arising from Plaintiff's obesity were
4 accommodated in the residual functional capacity. *Burch v.*
5 *Barnhart*, 400 F.3d 676, 682-84 (9th Cir. 2005) (When an ALJ does
6 not find obesity severe at step two, the ALJ does not err if the
7 limitations from obesity are included in the residual functional
8 capacity.).

9 The Commissioner also asserts that Plaintiff is incorrect in
10 stating that the ALJ did not follow the guidance in SSR 02-1,
11 because an ALJ is not to make assumptions about the functional
12 effects of obesity combined with other impairments. ECF No. 20 at
13 6-7. Rather it is Plaintiff's obligation to provide evidence of
14 limitations arising from his impairments. 20 C.F.R. §§
15 404.1512(a), 416.912(a). *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th
16 Cir. 1998) ("At all times, the burden is on the claimant to
17 establish h[is] entitlement to disability insurance benefits.").

18 **1. Pertinent Facts**

19 The medical records contain many varying measurements of
20 Plaintiff's height and weight. Plaintiff's height has been
21 measured as five feet and ten inches, five feet nine inches, five
22 feet eight inches (Tr. 205, 219, 319, 371, 373, 408, 482, 503,
23 506, 521). His weight has been measured anywhere from 240 pounds
24 to 298 pounds. (Tr. 219, 230, 319, 373, 408, 433, 482, 503, 506).

25 On one occasion, a physician at Inland Cardiology noted that
26 Plaintiff was well-developed, well-nourished, appeared to be his
27 stated age, and in no acute distress. The physician did not make
28 any findings that Plaintiff's obesity constituted a medical

1 impairment, that it was severe, or that it caused any functional
2 limitations, separately, or in combination with Plaintiff's other
3 alleged impairments (Tr. 219). On another occasion, a different
4 physician at Inland Cardiology too noted he was well-nourished,
5 but did not make any findings that Plaintiff's obesity constituted
6 a medical impairment, that it was severe, or that it caused any
7 functional limitations, separately, or in combination with
8 Plaintiff's other alleged impairments (Tr. 376, 377).

9 At the hearing, the ALJ recited Plaintiff's testimony in 2009
10 that he weighed 300 pounds and had been at that weight for the
11 past three years (Tr. 20, 56). The ALJ also noted Plaintiff's
12 testimony that he weighed 180 to 220 pounds when he was working
13 (Tr. 20, 56). The ALJ found that Plaintiff had lost 18 pounds by
14 August 2007 (Tr. 20), referencing a report reciting Plaintiff's
15 weight to be 272 pounds (Tr. 432-33). Plaintiff's counsel also
16 argued at the hearing that Plaintiff's weight caused shortness of
17 breath (Tr. 56-57). However, when the ALJ asked for medical
18 documentation supporting that argument, counsel admitted none
19 existed (Tr. 57).

20 2. Applicable Law

21 SSR¹ FN6 02-1p directs adjudicators to consider the effects
22 of obesity not only under the listings but also when assessing a
23

24 ¹ Social Security Rulings "represent precedent final opinions and orders
25 and statements of policy and interpretations that we have adopted." 20 C.F.R.
26 § 402.35(b)(1). Social Security Rulings are "binding on all components of the
27 Social Security Administration." *Heckler v. Edwards*, 465 U.S. 870, 873 n. 3,
28 104 S.Ct. 1532, 79 L.Ed.2d 878 (1984); *cf. Silveira v. Apfel*, 204 F.3d 1257,
1260 (9th Cir.2000) ("This court defer[s] to Social Security Rulings ...
unless they are plainly erroneous or inconsistent with the Act or
regulations"). SSR 02-01p, 2000 WL 628049, at *4 (Sept. 12, 2002).

1 claim at other steps of the sequential evaluation process, such as
2 the assessment of an individual's RFC. The Ruling explains how
3 obesity may increase the severity of related impairments,
4 particularly musculoskeletal and respiratory impairments, and
5 explains how the effects of obesity should be evaluated. An ALJ
6 must evaluate the additional impact of a claimant's obesity both
7 singly and in combination with the claimant's other impairments.

8 At step two of the sequential evaluation, the ALJ did not
9 include obesity as a severe impairment. There is, however, some
10 discussion in the ALJ's written decision regarding Plaintiff's
11 weight and consideration of his shortness of breath symptom. But
12 no medical documentation existed to attribute this symptom to
13 obesity rather than coronary artery disease. At step four of the
14 sequential evaluation, the ALJ determined that Plaintiff's
15 residual functional capacity was limited to light work, with no
16 prolonged standing or walking, no climbing of ladders, ropes, or
17 scaffolds, lifting no more than 20 pounds occasionally with
18 frequent lifting or carrying of objects weighing up to 10 pounds.

19 In his decision, the ALJ noted that Plaintiff reported to
20 his medical providers that he experienced shortness of breath with
21 minimal activity in April 2007 (Tr. 20). The ALJ also noted that
22 by August 2007, Plaintiff's shortness of breath showed 50 %
23 improvement (Tr. 20). The decision considered the state agency
24 physician's opinion that, considering this symptom [of shortness
25 of breath] and his physical impairments, Plaintiff would be
26 capable of light work that involved no more than occasional
27 climbing of ladders, ropes, or scaffolds or concentrated exposure
28 to hazards (Tr. 21, 464-67, 470). Therefore, Plaintiff's shortness

1 of breath, regardless of its cause, was accommodated.

2 The ALJ additionally found that, based on Plaintiff's
3 testimony that he tired easily and that his legs swelled when he
4 sat too long (Tr. 20), Plaintiff also needed a restriction to work
5 that allowed him to alternate sitting and standing (Tr. 19). Thus,
6 even if Plaintiff's shortness of breath, fatigue, and swelling
7 were attributable to his obesity rather than his coronary artery
8 disease, those symptoms were accommodated in the residual
9 functional capacity.

10 The ALJ found that Plaintiff's medically determinable
11 impairment, coronary artery disease, could reasonably be expected
12 to cause the alleged limitations/symptoms discussed at the hearing
13 and in the ALJ's decision. These limitations are consistent with
14 those of the state agency physician Dr. Norman Staley, M.D., who
15 was aware of Plaintiff's weight and which limitations appear to
16 consider Plaintiff's obesity impairment (Tr. 464). Dr. Norman
17 Staley, M.D. also found it noteworthy that Plaintiff's shortness
18 of breath and chest pain symptoms had shown 50% improvement
19 according to Plaintiff's most recent cardiac evaluation available
20 for review.

21 At the time of the hearing, Plaintiff cited no evidence in
22 the record that the severity of his impairment [coronary artery
23 disease] was increased by his obesity such that additional
24 limitations were required. Plaintiff's argument concerning the
25 ALJ's alleged failure to rely on substantial evidence in the
26 record to determine the RFC and the alleged failure to evaluate
27 the impact of his obesity is unpersuasive. The court therefore
28 finds no error in the ALJ's application of SSR 02-1p to the facts

1 of this case.

2 3. Conclusion

3 In short, on the facts presented here, Plaintiff has failed
4 to show that the ALJ's assessment and findings regarding
5 Plaintiff's obesity were erroneous. See *Hoffman v. Astrue*, 266
6 Fed. Appx. 623, 625 (9th Cir.2008) (ALJ's failure to consider
7 plaintiff's obesity in relation to residual functional capacity
8 proper because plaintiff failed to show how obesity in combination
9 with another impairment increased severity of limitations); see
10 also *Burton v. Astrue*, 310 Fed. Appx. 960, 961 n. 1 (9th Cir.2009)
11 (rejecting plaintiff's assertion that ALJ failed adequately to
12 consider plaintiff's obesity where plaintiff failed to specify how
13 his obesity limited his functional capacity or how it exacerbated
14 his currently existing condition; noting that ALJ's consideration
15 of obesity in overall assessment that plaintiff was capable of
16 working was proper).

17 B. Credibility

18 Plaintiff argues that the ALJ erred by discounting the
19 testimony of Plaintiff without having a physician examine
20 Plaintiff and evaluate the nature and extent of Plaintiff's
21 alleged limitations based on fatigue and pain. Plaintiff
22 challenges the finding of questionable credibility on the basis of
23 an opinion given by nurse practitioner, K. Casseday, ARNP, his
24 "primary care giver." (Tr. 38, 269). In January 2007, a few months
25 before Plaintiff had surgery, Ms. Casseday opined that for three
26 to six months, Plaintiff would be severely limited, primarily due
27 to his shortness of breath (Tr. 268-69).

28 The Commissioner asserts that the ALJ provided several clear

1 and convincing reasons for finding Plaintiff not fully credible.
2 Specifically, the Commissioner notes the ALJ found Plaintiff not
3 fully credible because his statements were contradicted by the
4 lack of restrictions imposed by his treatment providers (Tr. 21).
5 Despite Plaintiff's testimony that he was limited to walking for
6 one block, standing for a half hour to an hour, or sitting for any
7 length of time (Tr. 53-54), none of his physicians restricted his
8 activities. An ALJ may reject testimony contradicted by the
9 medical evidence. *Carmickle v. Comm'r of Soc. Sec. Admin.*, 533
10 F.3d 1155, 1161 (9th Cir. 2008).

11 The Commissioner further argues that after Plaintiff's
12 cardiac evaluation in 2007, Plaintiff was instructed to inform his
13 doctors of increased symptoms, but was not instructed to limit
14 himself in his activities (Tr. 434). The ALJ additionally found
15 Plaintiff's shortness of breath improved fifty percent in less
16 than seven months (Tr. 20) following his surgery.

17 The Commissioner argues that Nurse Practitioner Casseday's
18 opinion indicated that, in the few months leading to his
19 surgeries, Plaintiff had a temporary increase of symptoms that
20 were adequately treated shortly thereafter. The Commissioner
21 concludes the ALJ reasonably inferred from the lack of
22 restrictions that Plaintiff's testimony about the severity and
23 persistence of his chest pains, fatigue, and shortness of breath
24 was not fully credible.

25 To aid in weighing the conflicting testimony and medical
26 evidence, the ALJ evaluated Plaintiff's credibility and found him
27 less than fully credible (Tr. 21). Credibility determinations bear
28 on evaluations of medical evidence when an ALJ is presented with

1 conflicting medical opinions or inconsistency between a claimant's
2 subjective complaints and diagnosed condition. See *Webb v.*
3 *Barnhart*, 433 F.3d 683, 688 (9th Cir.2005).

4 It is the province of the ALJ to make credibility
5 determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir.
6 1995). However, the ALJ's findings must be supported by specific
7 cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir.
8 1990). Here, the ALJ gave several specific, cogent and convincing
9 reasons for his credibility assessment. Plaintiff's testimony was
10 contradicted by the objective evidence.

11 Plaintiff's statements were noted to have been somewhat
12 inconsistent at the hearing (Tr. 45). The ALJ observed Plaintiff
13 stating that he was "very much off the cigarettes"(Tr. 38, 45) but
14 then admitted to smoking cigarettes on a daily basis with his wife
15 (Tr. 39). The ALJ noted in his decision that Plaintiff drives,
16 continues to smoke, and is getting very little treatment,
17 suggesting his impairment is not as disabling as alleged (Tr. 21).

18 The ALJ's reasons for finding Plaintiff less than fully
19 credible are clear, convincing, and supported by the record. See
20 *Thomas v. Barnhart*, 278 F.3d 947, 958-959 (9th Cir.2002) (proper
21 factors include inconsistencies in plaintiff's statements,
22 inconsistencies between statements and conduct, and extent of
23 daily activities). Noncompliance with medical care or unexplained
24 or inadequately explained reasons for failing to seek medical
25 treatment also cast doubt on a claimant's subjective complaints.
26 20 C.F.R. §§ 404.1530, 426.930; *Fair v. Bowen*, 885 F.2d 597, 603
27 (9th Cir.1989).

28 / / /

CONCLUSION

Having reviewed the record and the ALJ's conclusions, this court finds that the ALJ's credibility and RFC assessment are supported by the record and free of error. The undersigned finds the ALJ's decision is free of legal error and supported by substantial evidence.

IT IS ORDERED:

1. Defendant's Motion for Summary Judgment, **ECF No. 20**, is **GRANTED**.

2. Plaintiff's Motion for summary Judgment, **ECF No. 18**, is **DENIED**.

The District Court Executive is directed to file this Order, provide copies to counsel, enter judgment in favor of defendant, and **CLOSE** this file.

DATED this 23rd day of July, 2012.

S/James P. Hutton

JAMES P. HUTTON
UNITED STATES MAGISTRATE JUDGE